

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,	)	No. CR-09-0172-LRS
Plaintiff,	)	(CV-13-0111-LRS)
vs.	)	<b>ORDER DENYING</b>
CLINTON LEE HALBERT	)	<b>§2255 MOTION</b>
Defendant.	)	

**BEFORE THE COURT** is Petitioner's "Motion to Vacate, Set Aside, Or Correct Sentence Pursuant to Title 28 U.S.C.A. §2255." ECF No. 373.

The court normally conducts an initial review of a §2255 motion. The initial standard of review for motions under §2255 is whether:

[I]t plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court . . . .

Rule 4(b), Rules Governing Proceedings in the United States District Courts under Section 2255 of Title 28, United States Code. This initial review was not conducted because counsel was appointed upon the motion of Petitioner and the United States Attorney filed a response.

**I. BACKGROUND**

Clinton Lee Halbert was indicted on December 16, 2009 for Conspiracy to Manufacture a Controlled Substance in violation of 21 U.S.C. § 846 and Manufacture of Marijuana in violation of 21 U.S.C. § 841(a)(1). Mr. Halbert proceeded with trial on June 28, 2010 and the jury rendered a guilty verdict on July 1, 2010 for both counts. On February 8, 2011, Mr. Halbert was sentenced to

**ORDER DENYING  
§2255 MOTION-**

54 months probation, with home confinement for 18 months concurrent on each count; and 3 years Supervised Release on each count and concurrent; and a special assessment of \$200. The fine was waived. On February 16, 2011, Judgment was entered. (ECF No. 259).

Mr. Halbert, through counsel Ms. Lindholdt, filed a direct appeal of his final judgment and sentence on February 23, 2011, pursuant to Fed. R. App. P. 4(b)(1). On April 10, 2012, the Ninth Circuit Court of Appeals affirmed the district court's decision. ECF No. 355. On March 15, 2013, Mr. Halbert filed a 28 U.S.C. § 2255 petition. ECF No. 373. After an initial denial of Mr. Halbert's request for appointment of counsel, the Court reconsidered its order based on the exceptional circumstances shown in Petitioner's motion for reconsideration. ECF No. 380. Counsel was appointed on June 19, 2013 to represent Petitioner for his § 2255 habeas petition.

Mr. Halbert raises four grounds in his petition: 1) ineffective assistance of counsel; 2) lack of probable cause and trespass; 3) violations of substantive and procedural due process (denied a fair trial); and 4) illegal search and seizure.

## II. DISCUSSION

### A. Ineffective Assistance of Counsel

Defendant must prove: (1) counsel's performance was deficient, and (2) movant was prejudiced by such deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). As to the first prong, there is a strong presumption counsel's performance was sufficiently effective. *Id.* at 689. Defendant must show his counsel's performance was "outside the wide range of professionally competent assistance." *Id.* at 690. As to the second prong, Defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different (i.e., a guilty plea would not have been entered). A "reasonable probability" is a "probability sufficient to undermine confidence in the proceedings." *Id.* at 694.

1 Petitioner contends in his original §2255 Motion, filed pro se (ECF No.  
2 373), that the (4) grounds for his motion are: 1) ineffectual assistance of counsel  
3 (conflict of interest, communication between Pat Stily and Frank Cikutovich); 2)  
4 lack of probable cause and trespass; 3) substantive and procedural due process  
5 violation(s); and 4) illegal search and seizure.

6 Petitioner contends his counsel was ineffective because the “[c]ase was not  
7 investigated or supported with the facts on pre-trial and trial.” ECF No. 373 at 4.  
8 Petitioner claims that the “[m]otions lacked substance, facts...” *Id.* Petitioner  
9 argues that he was provided with “unethical advice” but does not provide any  
10 details for this Court’s review.

11 In ground two of his original §2255 Motion, Petitioner alleges lack of  
12 probable cause and trespass. Petitioner alleges that Agent Petty violated the rights  
13 of “vacationers, residents and defendants privacy” by entering the private property  
14 of China Bend Winery to “sneak and creep” from 1:05 a.m. to about 2:30 a.m.  
15 when a common person expects privacy. However, the Ninth Circuit determined  
16 that Agent Petty’s warrantless entry was not an illegal search in violation of the  
17 Fourth Amendment. *United States v. Halbert*, 472 Fed. Appx. 461 (9th Cir.  
18 2012)(unpublished).

19 In ground three of the original §2255 Motion, Petitioner alleges  
20 “substantive and procedural due process violations.” Petitioner argues he was  
21 unlawfully precluded from presenting a medical marijuana defense. The Ninth  
22 Circuit addressed this issue and determined that “the district court was correct in  
23 excluding evidence of Clinton Halbert’s proposed medical marijuana defense.” *Id.*

24 In ground four of the original §2255 Motion, Petitioner alleges “illegal  
25 search and seizure.” However, the Ninth Circuit determined that the “district court  
26 did not clearly err by issuing either of the two search warrants in this case, or by  
27 denying the Halberts’ motion to suppress evidence and their request for a Franks  
28 hearing.” *Id.*

**ORDER DENYING  
§2255 MOTION-**

1 Petitioner, through counsel, additionally argues in the Supplement &  
2 Amendment (ECF No. 389) that in the motion to suppress evidence, trial counsel  
3 did not utilize longstanding Ninth Circuit precedence and failed to move the  
4 Court to examine the presence of probable cause separately for each of the  
5 residences located on the subject parcel. (ECF No. 89-1).

6 The record simply does not support Mr. Halbert's allegations of ineffective  
7 assistance of counsel. The argument regarding separate probable cause for each  
8 residence will be discussed more thoroughly in section B below. Mr. Halbert has  
9 failed to establish that his counsel fell below an objective standard of  
10 reasonableness. First, counsel prepared and filed a lengthy motion for Franks  
11 Hearing/Motion to Suppress Evidence. (ECF No. 89). Second, counsel filed a  
12 declaration of Defendant Halbert in an effort to provide a basis for the pretrial  
13 motion. (ECF No. 89-2). Third, counsel provided the Court with several  
14 attachments in support of his motion to suppress evidence. (ECF No. 89-3).  
15 Fourth, counsel filed additional memoranda prior to trial as well as motions in  
16 limine. (ECF No. 118; 129). Fifth, counsel cross-examined each of the  
17 government's witnesses at trial. (ECF No. 130). Lastly, counsel filed a detailed  
18 sentencing memorandum which resulted in a sentence of probation only, despite a  
19 recommended guideline range of 21-27 months imprisonment for each count,  
20 concurrently. (ECF No. 238).

21 Here, Petitioner has not shown that a reasonable probability exists that the  
22 outcome of the case would have been different if his attorney had given the  
23 assistance that Petitioner suggests he should have provided. Petitioner received  
24 probation rather than imprisonment. These ineffectiveness claim(s) are without  
25 merit.

#### 26 **B. Probable Cause**

27 The thrust of Petitioner's argument is that probable cause did not exist for  
28 his residence and defense counsel failed to conduct a separate and independent

1 examination of the facts to determine if probable cause existed for each separate  
2 residence. ECF No. 389 at 25-26. Petitioner and his co-defendant son lived at  
3 two separate residences 3772 Vineyard Way and 3767 Vineyard Way respectively  
4 on the subject property but the warrant issued pertained to 3772 Vineyard Way  
5 (Petitioner's residence) only.

6 The Government responds that the affidavit clearly established probable  
7 cause to search 3772 Vineyard Way. A review of the affidavit in question shows  
8 that the affiant clearly advised the magistrate of the existence of the two separate  
9 residences. Throughout the affidavit the affiant clearly drew a distinction  
10 between 3767 Vineyard Way and 3772 Vineyard Way. The Government  
11 specifically lists the probable cause factors that the Magistrate had before him: 1)  
12 Hatfield had described a marijuana bunker buried under the ground; 2) the  
13 marijuana bunker was located in close proximity to 3772 Vineyard Way; 3) a  
14 FLIR device was activated which confirmed a hidden structure underneath the  
15 ground; 4) Agent Petty had been on the property and observed the alleged  
16 marijuana bunker and observed items commonly associated with growing  
17 marijuana; 5) Defendant and his spouse were identified as the customer/subscriber  
18 for the power utilized on the parcel; 6) the billing address for the power was 3772  
19 Vineyard Way; 7) there was a massive jump in power as to both meters and there  
20 did not appear to be any significant fluctuation in power typically common during  
21 the four seasons; and 8) information provided by the State of Washington  
22 Employment Security Department (allowing a comparison of income to Avista  
23 Utility bills (power bill) showing 29% of total income was dedicated to power  
24 bills); 9) an informant had previously reported the odor of cultivating marijuana  
25 coming from with the structure on the Defendant's property; 10) Hatfield had  
26 ledgers documenting that he had been purchasing marijuana from "Clint" and  
27 "Wright"; 11) Hatfield reporting purchasing marijuana from Wright and that he  
28 (Hatfield) believed Wright was selling marijuana for the Defendant; 12) despite

1 the massive power jump in power, 3767 Vineyard Way had little power (Wright  
 2 utilized lanterns as a light source); and 13) Stevens County Real Property Search  
 3 indicated the parcel in question was owned by the Defendant, his spouse, and co-  
 4 Defendant Wright Halbert.

5 Petitioner argues that the power consumption for 3767 Vineyard Way is  
 6 nearly double that of 3772 Vineyard Way. (ECF No. 389 at 20). The Government  
 7 responds that the Defendant and his spouse were the customers/subscribers for all  
 8 power meters on the parcel and according to Hatfield, the 3767 Vineyard Way  
 9 residence was utilizing lanterns and propane.

10 Petitioner argues that despite the fact that he is the subscriber/customer for  
 11 all Avista Utility bills, it is merely a “hunch” that he was aware of the bills or the  
 12 massive increase in power utilized. The Government counters that a magistrate is  
 13 free to draw “reasonable inferences . . . from the material supplied to him by  
 14 applicants for a warrant.” *Dougherty v. City of Covina*, 654 F.3d 892, 898 (9th Cir.  
 15 2011)(quoting *Illinois v. Gates*, 462 U.S. at 238). The Government also notes that  
 16 Petitioner fails to appreciate the fact that the massive power consumption lacked  
 17 any fluctuation common with a change of seasons.

18 The Court does not find Petitioner’s arguments convincing. The Court has  
 19 reviewed the parties’ arguments and finds that the 52-page affidavit supplied  
 20 probable cause under the totality of the circumstances approach. *United States v.*  
 21 *Celestine*, 324 F.3d 1095, 1102 (9th Cir. 2003).

### 22 **III. CONCLUSION**

23 The Court finds that based on the §2255 motion and the prior proceedings  
 24 in the case, Petitioner is not entitled to relief. Petitioner’s “Motion to Vacate, Set  
 25 Aside, Or Correct Sentence Pursuant to Title 28 U.S.C.A. §2255” (**ECF No. 373**)  
 26 is **DENIED**, as is his request for an evidentiary hearing to review the claim of  
 27 ineffective assistance of trial counsel’s failure to allegedly “raise a meritorious  
 28 Fourth Amendment issue before the trial court.” (ECF No. 400 at 28).

**ORDER DENYING**  
**§2255 MOTION-**

*s/Lonny R. Suko*

**LONNY R. SUKO**  
Senior United States District Judge